THE PROGRESS OF THE LAW, 1918–1919

WILLS AND ADMINISTRATION[1]

THE MAKING OF WILLS

I

THE Great War has not yet furnished us much litigation of American soldiers' wills. Doubtless instances will soon arise, and therefore two recent English decisions should be noted. In *Godman* v. *Godman*[2] it is stated that intention to make a will at the time of the creation of the matter offered for probate as a soldier's will is not necessary. It is enough if the testator deliberately intended to express his wishes for the disposition of his property after death. And so a letter of instructions for the alteration of a will would have been provable as a codicil, had it not been objectionable on other grounds. And likewise, a statement of the deceased to his fiancée, such as, "If I stop a bullet everything of mine will be yours," deliberately made in the presence of a witness, is good as a will, though there is some evidence that the deceased soldier thought he was incompetent to make a valid testament.[3]

We had never sympathized with the loose practice in the ecclesiastical courts under the Statute of Frauds which allowed written instructions to an attorney to operate, if necessary, as a will of personalty.[4] That practice clearly justifies, however, the action of Horridge, J., in the two recent cases. And we confess that, appearing in its present form, the practice does not seem so objectionable. The spirit of the provision governing this special class of wills certainly reaches to this situation. Expressions of soldiers in the trenches of their desires in regard to the disposition of their personalty after their death will, we predict, be given

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[1] The subject of Future Interests is not discussed herein.

[2] [1919] P. 229.

[3] *In re* Stable, [1919] P. 7.

[4] Fawcett *v.* Jones, 3 Phillim, 434, 485–487 (1810); Blackwood *v.* Damer, 3 Phillim. 458, note (1783); Masterman *v.* Maberly, 2 Hagg. 235, 247 (1829). See p. 620, *infra*.

effect to by our probate courts, though it cannot be proved that the deceased thought he was making a valid disposition of his worldly goods.

II

A joint will or a joint and mutual will may be executed in accordance with a contract between the testators to leave their property to the survivor, or to the survivor and after his death to others. Such a will is now held not against public policy. And some courts find the contract from the mere provisions of the will itself.[5] The better view is, however, that the contract should be clearly proved by other evidence than the mere execution of such an instrument.[6] In *Lewis* v. *Lewis* [7] a husband and wife by a joint and mutual will left their property to the survivor, and after the death of the survivor to their children. The wife died, the husband accepted benefits under the will, remarried, and died. The children of the first marriage brought a bill to quiet title to the husband's realty which the defendant, the second wife, claimed under the Statute of Distributions. The plaintiffs secured judgment, which was affirmed by the Supreme Court on the ground that there was a contract to leave the property as directed in the will, which after the receipt of the benefit was irrevocable by the second marriage or otherwise. Assuming, which is doubtful, the existence of a contract thus to dispose of the property, the result is correct, though the reasoning is not wholly satisfactory. If there is a will made in pursuance of a contract to devise, the will is indeed revocable, but the contract should be enforced in equity. And this view represents the weight of authority and the trend of the later cases.[8] Indeed the California court [9] has recently held that a second marriage revokes a will made in pursuance of a contract, but the agreement to devise is enforceable in equity. This is the neater handling of the matter, for the Probate Court in the old sense did not have

[5] Frazier *v.* Patterson, 243 Ill. 80, 90 N. E. 216 (1909).

[6] Edson *v.* Parsons, 155 N. Y. 555, 50 N. E. 265 (1898). Compare Cooke *v.* Burlingham, 105 Misc. 675, 173 N. Y. Supp. 614 (1919).

[7] 104 Kan. 269, 178 Pac. 421 (1919).

[8] Professor G. P. Costigan, "Constructive Trusts," 28 HARV. L. REV. 237, 250–251; Morgan *v.* Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919).

[9] Rundell *v.* McDonald, 182 Pac. (Cal. App.) 450 (1919). Compare, however, Chase *v.* Stevens, 34 Cal. App. 98, 166 Pac. 1035 (1917).

equitable powers.[10] In a modern probate court which by statute has full chancery powers, however, it may be expected that the short cut will be taken of probating a revoked will made in pursuance of a contract. It does not appear from the Kansas statutes that the Court of Probate has general equitable jurisdiction.[11]

III

The burden of establishing that a will is the act of a sane testator is upon the proponent in England and in many, but not all, of the United States.[12] The proponent, however, is often aided by the rule that if the will is rational on its face and appears to be duly executed, it will be held valid in the absence of evidence to the contrary.[13] The burden of proving undue influence, *i. e.*, coercion, however, is placed generally upon the contestant. This appears clear enough from the United States decisions;[14] but the English doctrine seems not wholly settled, though probably Baron Parke's remarks,

"the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator,"[15]

would there be followed.

In *Spradlin* v. *Adams*[16] the court assumes that the burden of proving sanity is on the proponent, but declares that he has discharged the burden of going forward with evidence upon showing that the paper was not irrational in its provisions.[17] That the burden is upon the proponent is laid down specifically in *In re Dale's Estate*[18] and in *Johnson* v. *Shaver*.[19] *Adams* v. *Cooper*[20] puts the matter thus:

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[10] 27 YALE L. J. 546–547.

[11] GEN. STAT. (1915), chap. 27, art. 9.

[12] 1 JARMAN, WILLS, 6 Eng. ed., 48; 1 WOERNER, AM. LAW ADM., 2 ed., § 26.

[13] *Ibid.*

[14] 1 WOERNER, AM. LAW ADM., 2 ed., § 31.

[15] Barry *v.* Butlin, 2 Moo. P. C. 480, 482 (1838). And see 1 JARMAN, WILLS, 6 Eng. ed., 48. But compare Parfitt *v.* Lawless, L. R. 2 P. & D. 482 (1872), where it seemed to be assumed that the contestant had the burden of establishing coercion.

[16] 182 Ky. 716, 207 S. W. 471 (1919).

[17] On this latter point see Keller *v.* Lawson, 261 Pa. 489, 104 Atl. 678, 679 (1918); *In re* King's Will, 172 N. Y. Supp. 869, 872 (1918); *In re* Dow's Estate, 183 Pac. (Cal). 794 (1919).

[18] 179 Pac. (Ore.) 274 (1919).

[19] 172 N. W. (S. D.) 676 (1919).

[20] 148 Ga. 339, 343, 96 S. E. 858 (1918).

"The burden is . . . upon the propounder . . . to make out a prima facie case by showing the factum of the will, that is, to show that [the testatrix] executed the paper in the manner the law requires wills to be executed; that at the time of its execution the testatrix apparently had sufficient mental capacity to make it, and in executing the will she acted freely and voluntarily. . . . The burden is thereby shifted to the caveators to prove the validity of the objections they have made to the probate of the will."

In *Oilar* v. *Oilar*[21] the contestant failed to sustain the burden put upon him by the court to establish the invalidity of the will and the codicil for undue influence and insanity.[22] This general doctrine as to undue influence has been reaffirmed in *In re Dale's Estate, supra*, and in *Re Fenstermacher's Estate;*[23] but observe the statement to the contrary in the extract from *Adams* v. *Cooper, supra*. A series of Illinois cases has reiterated the doctrine already enunciated in Illinois that the mere fact that a beneficiary is in a confidential relation to the testator does not shift to him the burden of proof that he did not coerce the deceased,[24] and that presumption of coercion only arises when the beneficiary prepares the will.[25] A person not a blood relation to the testator, but whom he treated as a sister, is not in a confidential relation to him within the meaning of this rule.[26]

The burden of establishing sanity and freedom from undue influence should be upon the proponent. A will, unlike a contract, is a unilateral transaction, upon which other parties do not act until the court passes upon it. It may well be said that insanity and coercion are not affirmative defenses to be alleged and proved by the heir, but must be negatived by those who insist on the will. The slight recognition of this in undue influence by *Adams* v. *Cooper* is gratifying in view of the great weight of authority to the contrary. The current decisions in general fall into the common error of failing to distinguish clearly between the burden of going forward with evidence and the burden of establishing the issue.

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[21] 120 N. E. (Ind.) 705 (1918).

[22] See *accord* as to insanity, Gilmore *v.* Griffith, 174 N. W. (Iowa) 273 (1919).

[23] 102 Neb. 560, 168 N. W. 101 (1918).

[24] McCune *v.* Reynolds, 123 N. E. (Ill.) 317 (1919).

[25] Wunderlich *v.* Buerger, 287 Ill. 440, 122 N. E. 827 (1919); Snyder *v.* Steele, 287 Ill. 159, 122 N. E. 520 (1919).

[26] Gager *v.* Mathewson, 107 Atl. (Conn.) 1 (1919).

The Illinois cases on beneficiaries in a confidential relation to the testator represent a compromise between those decisions which follow the rule as to transactions *inter vivos* and those which reject it.[27] On principle the analogy of deeds should not be followed. Such advisers are the natural objects of the testator's bounty. Each case should be dealt with on its own facts; in each the question being: has, on all the evidence, the propounder of the will sustained the burden of establishing that the deceased acted freely? The relation to the testator is merely one of the facts of more or less importance depending upon the circumstances.[28]

IV

Mistakes in a will conceivably might be remedied by either (*a*) construction or (*b*) reformation. By the first method the court finds that though the testator has made a mistake, the rest of the will has enough in it to express poorly yet sufficiently the testator's meaning. In all jurisdictions this power, of course, lies in the courts. By the second method the mistake might be remedied by striking out in the Probate Court, and in the court exercising similar jurisdiction, words inserted by mistake, as has occasionably been done in recent English decisions, but rarely, if at all, in the United States; or by inserting words erroneously omitted, which has never been allowed in any common-law jurisdiction.

In *Stevenson* v. *Stevenson*,[29] the testator owned land in township 6 north, range 7, west of the fourth principal meridian, in Hancock County. He devised land in township seven (7) north of the base line, and range six (6) west of the fourth principal meridian, situated in the county of Hancock, which described an existing lot never owned by him. There was nothing in the will indicating that he intended to devise land he owned. The court, following *Kurtz* v. *Hibner*,[30] declined to allow the lots in township 6 north to pass under the will. Three judges dissented.

A similar result on similar facts was reached in *Rivard* v. *Rivard*,[31]

[27] See Parfitt *v.* Lawless, L. R. 2 P. & D. 482 (1872); Ginter *v.* Ginter, 79 Kan. 721, 743, 101 Pac. 634 (1909); St. Leger's Appeals, 34 Conn. 434 (1867); Morris *v.* Stokes, 21 Ga. 552, 575 (1857).

[28] See Barry *v.* Butlin, 2 Moo. P. C. 480 (1838).

[29] 285 Ill. 486, 121 N. E. 202 (1918).

[30] 55 Ill. 514 (1870).

[31] 285 Ill. 564, 121 N. E. 212 (1918).

decided on the same day; but the contrary was held last fall in Iowa in *Wilmes* v. *Tiernay*.[32] In *Perkins* v. *O'Donald* [33] the facts were the same, except that the will recited at the beginning that the testatrix was desirous of settling her worldly affairs and of "directing how the estate with which it has pleased God" to bless her should be disposed of after her death; and under item 5 (the device in question being numbered "Item 3") she settled the "rest and residue" of her estate in trust. The court refused to allow the lot actually owned by the testatrix to pass under the will.

The case of *Stevenson* v. *Stevenson* caused Mr. H. Clay Horner to propose last spring to a committee of the Illinois Legislature the following amendment to the Chancery Act, Section 50:

"50. 'The court may hear and determine bills to construe wills, notwithstanding no trust or questions of trust, or other questions are involved therein; *and in so construing wills, the court shall, in all cases, take into consideration the material facts and circumstances surrounding the testator at the time the will construed was executed, and at the time the testator died and if such facts and circumstance show that a mistake was made in writing the will, and also show the actual intent of the testator, the court may correct such mistake and give effect to the actual intent of the testator.*'"

He has also supported the bill in three editorials in the Illinois Law Bulletin.[34] Mr. Albert M. Kales has written notes opposing it.[35] The bill was later narrowed by its proposer to limit its terms strictly to descriptions of property in wills. Mr. Kales suggested as a substitute the following:

"that the court may find by implication in a will the words 'belonging to me' in connection with any description of real estate devised, provided it is satisfied from the context of the instrument, and evidence admissible under the existing rules of law, that the intent of the testator's inducement was to devise land belonging to himself."

Mr. Horner finds necessity for his legislation in the narrow doctrine of *Kurtz* v. *Hibner*, which has in effect been overruled in Illinois, and in a desire to extend to wills the jurisdiction in equity to reform transactions *inter vivos*, and adds that "the highest court

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[32] 174 N. W. (Iowa), 271 (1919).
[33] 82 So. (Fla.) 401 (1919).
[34] 2 ILLINOIS L. BULL. 175, 286, 293.
[35] *Ibid.*, 287; 14 ILLINOIS L. REV. 147.

in the land has added the jurisdiction to correct mistakes in wills without legislation." Here he refers to the decision of the Supreme Court of the United States in *Patch* v. *White*.[36]

Mr. Kales, on the other hand, finds that *Kurtz* v. *Hibner* has not been departed from in Illinois, that it is clearly distinguishable from *Patch* v. *White*, wherein the will clearly showed on its face, first, the desire of the testator to devise property belonging to him, and all of it; second, his belief expressed in the residuary clause that he had already disposed of his lot now in litigation; and third, the added description of the land as containing "improvements." [37] Mr. Kales dissents from the view that the Supreme Court reformed the will in *Patch* v. *White* for mistake, and considers Mr. Horner's proposed legislation a calamity to the law of the state, as giving unlimited jurisdiction to reform a will for mistake. Mr. Horner replies that in applying the rule of *falsa demonstratio* courts have many times corrected mistakes, and that the minority in *Patch* v. *White* said that the court reformed the will for mistake. The Kurtz case follows *Miller* v. *Travers*,[38] where the words "all my freehold estate" were in the will and disregarded, yet the Stevenson case clearly holds that had those words been in the will all devises would have been good. Mr. Horner therefore fails to find the harmony in the Illinois cases and in *Patch* v. *White*. He finally quotes Professor J. B. Thayer on *Kurtz* v. *Hibner*, that the true view

"appears to be that there is no question of ambiguity in the matter; there is a mistake; and the question is whether the will, taken as a whole, admits of a construction which will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are to be looked at, and then the inquiry is whether, in view of all these facts, anything passes. The method of the court in that case is justly discredited. In reality Wigram's book, in 1831, gave it a death-blow." [39]

We can view Mr. Horner's proposed legislation in no other light than giving the court power to go so far as to fill in a complete blank in a will provided there is clear enough evidence of the testator's intent. Mistakes of course can to a limited extent be

[36] 117 U. S. 210, 217 (1886).

[37] See Mr. Kales' article in 28 YALE L. J. 33, 46–48.

[38] 8 Bing. 244 (1832).

[39] THAYER, PRELIMINARY TREATISE ON EVIDENCE, 467, 468.

corrected by construction if something is found in the will upon which to hang the testator's intent.[40] But the proposed bill, in spite of the words "and in so construing wills," would seem to go far beyond this. And indeed Mr. Horner intended that it should, for he says of it:[41]

"the power to *correct mistakes* is all that is new, and this power is given only where, as in Stevenson's case, the court can see the mistake, but feels powerless under the 'construction-throttling' precedents, to correct it."

No court — much less our Supreme Court — has or will fill in a blank in a will by reformation. Our Supreme Court was speaking of correcting mistakes by construction where it said in *Patch* v. *White*,

"where it [the ambiguity] consists of a misdescription . . . if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected."

Patch v. *White* was rightly decided on the ground of construction of the whole will, and is distinguishable in its facts from the Stevenson case and *Kurtz* v. *Hibner*. Professor Thayer, while he preferred the attitude of the court in *Patch* v. *White* to that in *Kurtz* v. *Hibner*, and thought the two cases indistinguishable, clearly felt that the correction of the mistake by the United States Supreme Court was through the process of construction. He deals with the case under the heading of construction, paragraph 10 (i).[42] Under paragraph 13[43] he discusses *Miller* v. *Travers*,[44] and shows that no question of construction was involved therein, but an unsuccessful attempt to reform a will for mistake. That Professor Thayer would have been opposed to filling in a blank in a will is clear from his reference to an imperfection of expression which is in its nature inconceivable: "as a gift 'to one of the sons of J. S.,' or 'to Mr. ——.' In such cases, of course, no 'parol evidence' can help."[45]

We cannot but feel that the attitude of the chancellors and the

[40] Compare *In re* Wolverton Mortgaged Estates, 7 Ch. D. 197 (1877).

[41] 2 ILLINOIS L. BULL. 175, 179.

[42] THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 449, 466.

[43] *Ibid.*, 474.

[44] 8 Bing. 224 (1832).

[45] THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 435.

judges in refusing to reform a will for mistake is wise. Historically perhaps the reason for this refusal was, as Mr. Horner points out,[46] the absence of consideration,[47] but an equally important reason is the dangerous character of the jurisdiction to inquire into a man's intent after his death,[48] and the additional objection, in the case of inserting words omitted through error, that to that extent the requirement of witnesses in the Wills Act will be violated. Extrinsic evidence must be gone into in aid of construction, for there is no

"lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes." [49]

But to substitute the testator's intent for what he has said in the will or omitted therefrom is an entirely different matter.

We are therefore glad to hear that Mr. Horner's proposals have been rejected by the committee of the Illinois legislature.

Turning for a moment to the four recent cases, we find that *Stevenson* v. *Stevenson* and *Rivard* v. *Rivard* are not inconsistent with *Patch* v. *White*, for in neither of the two cases was there anything on the face of the will to show that the testator, as in *Patch* v. *White*, was trying to dispose of property which he owned. In the Iowa case of *Wilmes* v. *Tiernay* the provisions of the will are not given except the clause in dispute, which does not show that the lot referred to belonged to the testator. The report states that the rest of the will disposed of all his property except the lot in question, and that the lot described in the will was to be sold and the proceeds applied for masses. These two facts are hardly enough to justify a result similar to that in *Patch* v. *White*. In the Florida case, however, it is clear from the face of the will that the testatrix meant to dispose of property she then owned, that she owned no other property in North Pablo Beach than the lot in question, and the disputed devise referred by exact description to actual property in North Pablo Beach which did not in fact belong to her. It would

[46] 2 ILLINIOS L. BULL. 296.

[47] Mr. Roland Gray in 26 HARV. L. REV. 212.

[48] SUGDEN, LAW OF PROPERTY, 197; Kales, 2 ILLINOIS L. BULL. 291.

[49] THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 428, 429.

seem, therefore, that the Florida case is in its result at variance with *Patch* v. *White*, though it must be admitted that the latter will more clearly described the lot in litigation than the former.

WILLS — MISCELLANEOUS CASES

I

Some miscellaneous cases on the making and revocation of wills may be considered. A young man in good health about to start on a long journey made the following will, duly witnessed:

"In case of any serious accident, after my just debts are paid, I direct that my aunt Miss Mary E. Clark, take entire charge of my estate for disposal as she sees fit."

Apparently the deceased died several years later, not because of an accident. The court held the will not conditional and admitted it to probate.[50] Even if it be said that the words "in case" tend toward condition, that clause used by a young man in full health to whom death presented itself only in the form of an accident may, in a will disposing of all his property to a near relative, be construed to be interpreted as absolute.[51]

II

The provision of the New York statute that a will must be signed "at the end of the will" [52] still fosters litigation, even in cases which had all but been previously decided. In *Lowden's Estate* [53] the will was on a sheet of paper folded to form four pages. The first page contained a printed form of will. Some bequests were on page one in the space allotted to them. There was not, however, room enough for all, and in the middle of the fourth bequest the testatrix had written "continued on back," and other gifts covered page two and part of page three. The signatures of the testatrix and witnesses were in the spaces provided for them on the first page. The court rightly, in view of prior New York decisions,[54] declined to probate any part of the instrument. As an

[50] *In re* Tinsley's Will, 174 N. W. (Iowa) 4 (1919).

[51] Eaton *v.* Brown, 193 U. S. 411 (1904).

[52] CONSOL. LAWS 1909, Decedent Estate Law, § 21.

[53] 106 Misc. 707, 175 N. Y. Supp. 591 (1919).

[54] Matter of Conway, 124 N. Y. 455, 26 N. E. 1028 (1891).

original question — not now open in New York — a strong argument might be made for probating the parts of the will which preceded the testator's signature.

III

The federal court, administering the law of Missouri, has held that whether or not under the statute the witnesses of a blind woman's will have signed in her presence depends upon the same rule as that which would be applied to her if she had had sight. Apparently in the case of a normal testator the court thinks that for Missouri the rule is or ought to be the usual one,[55] a signing within view of the testator. The test for the blind man is, then, Could he have seen the act of the witnesses had he had his sight? And this test was found to be satisfied where the witnesses were ten feet away in an adjoining room connected by an open archway with the chamber in which the testatrix was.[56] Thus the court follows the English rule for decedents who cannot see.[57] The dissenting judge, however, has the better of the argument in requiring a narrower rule for the blind. There is no hardship in insisting that consciousness through other senses of the witnesses' act should be required of a testator who cannot see. Indeed the protection of the statute can be secured to him in no other way; for the test within view of a person of full capacity can give him no aid; and yet his hearing and touch are unusually developed. An exception to a rule, sensible in the normal situation, should be made in the case of a person thus disabled, even though a closer proximity of the witnesses is thereby required.[58]

IV

A testatrix just before her death wrote a letter to her attorney which she signed and had witnessed by two persons as follows: "Dr. O'Kennedy — Dear Friend: Please destroy the will I made in favor of Thomas Hart." Dr. O'Kennedy had the will in his possession but did not destroy it. A New York surrogate court

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[55] Quirk *v.* Pierson, 287 Ill. 176, 122 N. E. 518 (1919).

[56] Welch *v.* Kirby, 255 Fed. 451 (1918).

[57] Goods of Piercy, 1 Rob. Eccl. 278 (1845).

[58] See Riggs *v.* Riggs, 135 Mass. 238 (1883).

admitted the will to probate.[59] The court seems right in saying that as the writing showed an intent to revoke by an act and not an intent to revoke by instrument, the letter cannot operate as a revocation. In England the same point — with less reason — has been decided in favor of the revocation,[60] though a slight difference in wording between the New York Act and the Wills Act of 1837 gives the American court an excuse for distinguishing the case.[61]

V

It is very unusual that a will with an express revocation clause fails to revoke a prior will, yet of course if from the whole of the second document it can be gathered that the testator meant both wills to be probated his intention will be carried out.[62] A recent and sound decision of this sort is *Owens* v. *Fahnestock*.[63] The first will contained nine numbered items. The ninth item contained the appointment of an executor. The second paper was headed "Item Ten," began with an exact copy of the formal preamble and the general revocatory clause of the first will, and then appointed W. L. Verner as attorney to take charge of the property after death "and hold same together until the arrival of my said executor. And that my said attorney immediately notify my said executor and also my other relatives." That was all. The court very properly probated both wills.

VI

Conditional revocations by subsequent instrument are possible but infrequent. The Pennsylvania court found no condition in a codicil reducing legacies in the will "in order to avoid a possible deficiency, which may grow out of the shrinking of investments." [64] This seems sound.[65]

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[59] *In re* McGill's Will, 107 Misc. 109, 177 N. Y. Supp. 86 (1919).

[60] Goods of Durance, L. R. 2 P. & D. 406 (1872).

[61] 107 Misc. 109, 177 N. Y. Supp. 86, 89, 90 (1919).

[62] Denny *v.* Barton, 2 Phillim. 575 (1818); Dempsey *v.* Lawson, 2 P. D. 98, 107 (1877); Simpson *v.* Foxon, [1907] P. 54.

[63] 96 S. E. (S. C.) 557 (1918).

[64] *In re* Prevost's Estate, 107 Atl. (Pa.) 388 (1919).

[65] Compare Att'y-Gen'l *v.* Lloyd, 1 Ves. Sr. 32 (1747); Penick's Ex'r *v.* Walker, 99 S. E. (Va.) 559 (1919).

VII

A bill in equity in New Jersey to set aside the probate of a will because of fraud in its procurement and in obtaining letters of administration and to enjoin defendant from using the surrogate's decree has been dismissed by the Vice Chancellor.[66] Here is an attempt to attack collaterally the decree of the Probate Court which has jurisdiction. No authority allows this.[67] Whether the court of equity will fasten a constructive trust on the fraudulent beneficiary in favor of those best entitled is, as the court points out, a different question.[68]

VIII

In *Sussex Trust Co.* v. *Polite*[69] the testator devised all land in Sussex County "where I now reside" to P. At the date of the will this tract contained about forty-five acres. He then conveyed twelve of these and at the same time acquired thirty-three acres of contiguous land. The court held that the latter tract had passed under the will. By the Delaware statute land acquired after the making of the will passes as if possessed at that time, unless a contrary intention is shown. This the court said with good reason was not as broad as the similar provision in the English Wills Act,[69A] and made no new rule of construction for specific devises but applied rather to general devises.[70]

Having found this devise to be a specific devise, the court then said that of course the ultimate question was as to the testamentary intention in the light of the facts existing at the death of the testator. How this conclusion is consistent with the rule of construction just enunciated it is hard to see. We believe that under the rule of the Delaware statute as to this devise the intention of the testator at

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[66] McCormack *v.* Burns, 89 N. J. Eq. 274, 105 Atl. 70 (1918).

[67] Noell *v.* Wells, 1 Lev. 235; Plume *v.* Beale, 1 P. Wms. 388 (1717); Allen *v.* M'Pherson, 1 H. L. Cas. 191 (1845); but see Barnesly *v.* Powel, 1 Ves. Sr. 119, 284 (1748).

[68] Marriot *v.* Marriot, 1 Strange, 666; Segrave *v.* Kirwan, Beatty (Ir.) 157 (1828); Broderick's Will, 21 Wall. (U. S.) 503 (1874); Mellor *v.* Kaighn, 89 N. J. L. 543, 99 Atl. 207 (1916) (*semble*). Compare Lewis *v.* Corbin, 195 Mass. 520, 81 N. E. 248 (1907); Dulin *v.* Bailey, 172 N. C. 608, 90 S. E. 689 (1916).

[69] 106 Atl. (Del.) 54 (1919).

[69A] 1 Vict. c. 26, § 24.

[70] Hines *v.* Mercer, 125 N. C. 71, 34 S. E. 106 (1899).

the date of the making of the will is important, and that subsequent acts of his are only admissible to clarify doubt as to his meaning at that time. His later purchase of thirty-three acres and use of them in connection with the balance of his Sussex property can hardly override his use of the words "where I now reside."[71] The decision, therefore, seems questionable.

IX

We are reminded by *In re Shirley's Estate*[72] that the modern tendency is to uphold a condition in a devise that the beneficiary, if he contests the will, shall lose his gift. That case reaffirms the California view, which enforces without reservation such a provision.[73] In Pennsylvania such a condition is enforced if the contest is without reasonable foundation, but otherwise not.[74] Pennsylvania reaches a highly desirable result, but it is difficult to see how a condition broadly framed, as is usual, to cover any sort of contest, can be divided by the court when the testator has not split it. We are left to choose, then, between supporting a provision preventing all litigation by the beneficiaries, or rejecting it entirely. The modern view seems to be that the chance for abuse of the process of the courts in will contests outweighs the disappointing of honest litigation. Even California does not go so far as to deprive a beneficiary under such a will of her legacy where she attempts, honestly but unsuccessfully, to probate a later document purporting to revoke the earlier instrument.[75]

Executors and Administrators

I

Statutes defining claims which survive against the representatives of a deceased person do not prevent litigation. *In re Brace's*

[71] 30 Harv. L. Rev. 298. Cranworth, V. C., in Stilwell *v.* Mellersh, 20 L. J. Ch. 356, 361 (1851). But see Garrison *v.* Garrison, 5 Dutch. (N. J.) 153 (1861), where, however, the statute differed slightly from that of Delaware.

[72] 181 Pac. (Cal.) 777 (1919).

[73] Estate of Hite, 155 Cal. 436, 101 Pac. 443 (1909).

[74] Friend's Estate, 209 Pa. 442, 58 Atl. 853 (1904).

[75] *In re* Bergland's Estate, 182 Pac. (Cal.) 277, 278 (1919). "Should any one or more of the beneficiaries named in this will object to the distribution as made, or attempt to defeat the provisions of this will that said person or persons shall receive the sum of five dollars ($5.00) each and no more."

Estate [76] holds that under the Code of Civil Procedure relating to debts against estates, a claim for unpaid alimony decreed to a wife for the maintenance and education of a son, who had predeceased his father, and which had accrued at the latter's death, was payable out of his estate. This broad interpretation of the word "debt" seems sound, and the result is in accordance with the cases elsewhere.[77] A claim in tort for deceit, however, has just been held in Washington not to survive against the administratrix of the tort-feasor.[78] The authorities are divided and continued litigation can only be prevented by very explicit language in the statute.[79]

The common-law rule that a personal action does not survive in favor of administrators is illustrated in decidedly modern form in a case under the Sherman Act. The heirs of one who had acquired a right in tort under that act against the defendants for damage caused by a conspiracy to monopolize the sugar refining business were not allowed to recover.[80] The Sherman law being silent as to revival and there being no other statute of the United States affecting the case, the court decided that the common law applied, and, on the analogy of actions of deceit, the cause abated, with the death of the plaintiff. By Statute 4 Edw III, c. 7, executors and administrators may sue for injury done to the personal estate of the deceased. In England the statute has been held to apply to an action against the promoters of a company for damage caused by a fraudulent prospectus, [81] and to an action of slander of title to a trade-mark.[82] This statute should be part of the common law of the United States and might well be extended by interpretation to any instance where the defendant's wrongful act has deprived the plaintiff's intestate of property, as in the principal

[76] 105 Misc. 178, 173 N. Y. Supp. 636 (1918).

[77] See Knapp *v.* Knapp, 134 Mass. 353 (1883); Martin *v.* Thison, 153 Mich. 516, 116 N. W. 1013 (1908); Hassaurek *v.* Markbreit, 68 Ohio St. 554, 67 N. E. 1066 (1903); *In re* Stillwell, [1916] 1 Ch. 365.

[78] State *v.* Blake, 181 Pac. (Wash.) 685 (1919).

[79] Arnold *v.* Lanier, 1 Car. Law Repository (N. C.) 529 (1813); Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397 (1888); Tichenor *v.* Hayes, 41 N. J. L. 193 (1879); Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438 (1886); Henshaw *v.* Miller, 17 How. (U. S.) 212 (1854); Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488 (1896); Boyles *v.* Overby, 11 Gratt. (Va.) 202 (1854); Lane *v.* Frawley, 102 Wis. 373, 78 N. W. 593 (1899).

[80] Caillouet *v.* American Sugar Refining Co., 250 Fed. 639 (1917).

[81] Twycross *v.* Grant, 4 C. P. D. 40 (1878).

[82] Hatchard *v.* Mège, 18 Q. B. D. 771 (1887).

case. Under recent statutes there is a conflict of decision on the survival of the action for deceit in favor of the representatives of the plaintiff.[83] The nearest analogy to the situation under the Sherman Act that we have found is *Frohlich* v. *Deacon*.[84] There executors sued for conspiracy and unlawful combinations and restraint of trade. The Michigan act provided that an action of assumpsit might be brought by representatives in any case where injury to person or property would be ground for action on the case for fraud or deceit at common law. The eight judges were equally divided as to whether the action for such conspiracy fell within the statute.

In *Pruett* v. *Caddigan* [85] the testator at the time of his decease was surety on a bond for $2500 given by the guardian of a minor's estate. In April, 1916, his executor filed his final account. In March, 1916, the guardian filed his first account, which was rejected, and in June, 1916, a judgment of $3421.96 was recovered against him for breach of trust. Execution being wholly unsatisfied, the new guardian sued the executor of the deceased as surety, who demurred on the ground that the claim had never been presented to him under § 5964 and § 6057 of the Revised Laws of Nevada. These provisions require that all claims should be filed in three months, and that as to any claim not due, or any contingent or disputed claim, the amount, or such part thereof as holder would be entitled to if claim were due, shall be paid into court. The court held that the present claim was not a contingent demand, but was on a contingency whether there would ever be a demand. Here nothing could be paid into court but the penal sum of the bond, which at the time for the presentation of claims might not only never be the amount due, but might never become payable at all. Such claims need not be presented before maturity. This is in accordance with the practice in other states.[86] The writer has discussed within the year the authorities and principles involved.[87]

The common law of England as modified by Stat. 11 Geo. II, c. 19,

[83] Cutting *v.* Tower, 14 Gray (Mass.) 183 (1859); Lane *v.* Frawley, 102 Wis. 373, 78 N. W. 593 (1899); Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771 (1896); Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438 (1886).

[84] 181 Mich. 255, 148 N. W. 180 (1913).

[85] 176 Pac. (Nev.) 787 (1918).

[86] MASSACHUSETTS REV. LAWS (1902), c. 141, §§ 9, 13, 26–32, as amended by Acts (1914), c. 699; Forbes *v.* Harrington, 171 Mass. 386, 50 N. E. 461 (1898).

[87] 32 HARV. L. REV. 329–332.

§ 15, giving an executor or administrator of a life tenant on whose death a lease granted by him had determined, the right to recover a ratable portion of the rent from the last day of payment to the death of the lessor, has been said to be part of the law of Oregon.[88] The technical rule that rent is not apportionable has been modified in many states by statute.[89] The Oregon case points a way to a just result where the legislature has not acted.

INHERITANCE TAXES

I

The decision in *In re Parker*[90] is entirely sound, and represents an important point of transfer tax law in a typical American family settlement. A New York testator left a large estate to trustees in trust for a niece, Mrs. P., for life, and after her death to divide the principal into as many shares as there were children of the niece then living and children then deceased leaving issue then surviving, the latter to take *per stirpes*. The residue was left to Mr. P., a nephew. By a possible though remote contingency, for the niece had several young children living at the testator's death, the nephew would receive the remainder to the class. In that event the tax would be higher than if the issue of Mr. and Mrs. P. took, for the residuary legatee was entitled at once under the will to an estate, exclusive of the remainder, of about $450,000, and the New York tax increases with the size of the legacy. The contingent remainder was held taxable as if it passed to the residuary legatee under the New York act,[91] which taxes forthwith a contingent interest at the highest rate that would be possible on the happening of any of the contingencies or conditions which the transfer may involve subject to a refund when the estate takes effect in possession. No other conclusion could have been reached by the court; yet the result is the tying up of property for the sake of a contingency little likely to occur. And it suggests to conveyancers the desirability in the future of drawing settlements as far as possible in the form of vested interests.

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[88] Perry *v.* Fletcher, 182 Pac. (Ore.) 143 (1919).

[89] 1 WOERNER, AM. LAW ADM., 2 ed., § 301.

[90] 226 N. Y. 260, 123 N. E. 366 (1919).

[91] LAWS OF 1919, c. 62, § 230.

II

Two recent Illinois cases have decided that in estimating "the clear market value of . . . property received by each person" upon which the state inheritance tax is to be estimated, the federal estate tax is to be considered an expense of administration and to be deducted.[92] Under the federal statute the tax is an estate tax, and not a charge against the particular beneficiary. This is sufficient to warrant the Illinois result and to account for the general unwillingness of the federal officers to deduct the state tax in estimating the amount due to the United States; for most state taxes are not based on the estate itself, but on the amount received by each distributee, and are a charge on him. Yet a federal judge has recently decided that if the state tax is, like the federal, on the estate and not paid by the beneficiary, it should be deducted in estimating the federal tax, under the provision allowing a deduction for "administration expenses . . ." and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.[93] If the same state under its decisions allows a deduction of the federal tax, puzzling questions will arise as to the method of estimating the amounts due to each jurisdiction. The subject should be cleared up by Congress and the state legislatures. The point is sufficiently important for their consideration, for it arises in connection with every estate of any magnitude.

III

The Illinois case of *People* v. *Northern Trust Co.*[94] contains a point by which conveyancers must not be misled. The testator during his life made trust deeds in favor of four of his children by which the trustee was to pay income to these children in equal shares, and after the death of each child his share was to pass as he

[92] People *v.* Pasfield, 284 Ill. 450, 120 N. E. 286 (1918); People *v.* Northern Trust Co., 124 N. E. (Ill.) 662 (1919); and see Appeal of Tyler, 104 Atl. (N. J.) 298 (1918); *In re* Knight's Estate, 261 Pa. 537, 104 Atl. 765 (1918); Hooper *v.* Shaw, 176 Mass. 190, 57 N. E. 361 (1900). In Estate of Gihon, 169 N. Y. 443, 62 N. E. 561 (1902), the court declined to deduct the United States tax, because under the law then in force the tribute was levied on the succession and not on the estate.

[93] Northern Trust Co. *v.* Lederer, 257 Fed. 812 (1919); 39 STAT. AT L. 777, § 203.

[94] 124 N. E. (Ill.) 662 (1919).

appointed with usual provisions in default of appointment, and other clauses common in American settlements. The agreements finally reserved to the settlor the power of revoking the deeds and trusts by notice in writing to the trustee. The court held that this reservation did not make the transfer taxable as "intended to take effect in possession or enjoyment at or after" death. One must not jump to the conclusion that such reservations are in all cases of no effect from the point of view of the transfer tax. In the principal case there was evidence that this provision was introduced not at the suggestion of the testator, but by the attorney by way of abundant caution to provide against the possible unworthiness of a beneficiary, and that the testator always declined to be consulted about the property. The court based its decision on the ground that the object of the power of revocation was not to evade the tax but merely to protect the grantees. No further effect, therefore, should be attributed to the decision.

IV

In *State* v. *Probate Court* [95] the testatrix left one third of a small estate to her husband and two thirds to her niece. To avoid a contest the will was probated by the consent of the legatees, the only parties interested, and a compromise agreement filed by which the husband and niece each took one half. Whether the husband took under the will or under the compromise was immaterial so far as taxing his interest was concerned. In either event his $10,000 exemption protected him. The court held, however, that the niece should pay taxes on one half only and not on the two thirds given her by the will. The decision has some support in Pennsylvania and Colorado.[96] But the contrary doctrine of Illinois, Massachusetts, and New York,[97] which taxes the estate according to the terms of the will and not according to the provision of the agreement, is preferable. It is true that a legatee may renounce, and if he does, the legacy is not taxable to him but to the residuary legatee; and if he may renounce in full, it is said he may by a com-

[95] 172 N. W. (Minn.) 902 (1919).

[96] Pepper's Estate, 159 Pa. 508, 28 Atl. 353 (1894); People *v.* Rice, 40 Colo. 508, 91 Pac. 33 (1907); Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907).

[97] Estate of Graves, 242 Ill. 212, 89 N. E. 978 (1909); Baxter *v.* Treas. and Rec'r Gen'l, 209 Mass. 459, 95 N. E. 854 (1911).

promise renounce in part, escape the burden, and let the person who actually receives the property pay the tax. But in renunciation, as in the case of lapsed [98] or void legacies, the law of wills or the intestate law — not the agreement of parties — carries the property to the person taxable. The doctrine of the Minnesota case lays the foundation for collusive agreements to deprive the government of its just due.

V

Both New York and Massachusetts have recently decided that the Federal Inheritance Tax is an estate tax, not a legacy or succession tax, and is not payable out of the interests of legatees, but from the residuary estate.[99]

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[98] Compare *In re* Hedenberg's Estate, 89 N. J. Eq. 173, 104 Atl. 221 (1918).

[99] *In re* Hamlin, 124 N. E. (N. Y.) 4 (1919); Plunkett *v.* Old Colony Trust Co., 124 N. E. (Mass.) 265 (1919).